

NONAGENCY

Introduction In certain, rare situations, licensees have found themselves in the position of not having an agency relationship with either party to a transaction. This may occur by the evolution of a transaction or by the preferences of the buyer or seller. For example, a licensee has been working with a buyer and treating that buyer properly as a customer. Subsequently, the buyer decides to purchase a home from a seller who is not offering subagency. If the buyer does not want representation, and now the seller does not offer subagency, the licensee represents no one.

Issues According to the *Idaho Real Estate License Law and Rules*:

Can a real estate licensee engage in the business of real estate without establishing an agency relationship with one or more parties to the transaction?

Can a “nonagent” receive compensation for engaging in the business of real estate?

If a licensee can act as a “nonagent” in a transaction, must he or she complete the agency disclosure statement in accordance with Section 54-2085, Idaho Code?

Discussion While the concepts of “facilitator” and “nonagent” evolve across the country, a number of questions are being asked as licensees and regulators try to determine if and how the statutes, rules and regulations apply or don't apply to these changing agency issues.

The initial question to be addressed is, does Idaho Code allow for the existence of a nonagent real estate licensee? Section 54-2004(31), Idaho Code, defines a real estate broker:

54-2004. Definitions.

(31) “Real estate broker” means and includes:

(a) Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others.

(b) Any actively licensed broker while, directly or indirectly, acting on the broker's own behalf;

(c) Any person who represents to the public that the person is engaged in any

of the above activities;

(d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth;

(e) a dealer in options as defined in this section.

It is the opinion of the Commission, together with its legal counsel, that this statutory definition of a real estate broker does two things.

First, it does not require the existence of an agency relationship with either buyer or seller. The Commission believes that a licensee can “act for another” without the action rising to the status of an agent. Agency is a consensual relationship. Clearly, a licensee cannot force an agency relationship upon a buyer or seller who refuses to enter into one.

Second, this statute is broad enough to require licensure for any facilitator or nonagent who might engage in any of the acts noted above or more completely spelled out in the statute. While there is not a fully-developed definition in case law of a real estate “facilitator” or “nonagents”, certain parallels can be drawn by comparing the level of duty and service with that provided in past years by a selling agent who worked with a “customer” (buyer) or a “middleman”.

Both real estate treatises and case law have repeatedly held that the payment of compensation alone does not create an agency relationship between a real estate licensee and a buyer or seller. Likewise, it follows that just because a licensee is a nonagent in a transaction, it does not mean the licensee cannot be paid for his or her work. Furthermore, the *Idaho Real Estate License Law and Rules* does not prohibit payment to a licensee who is acting for another without an agency relationship with that person. The law only requires a license (Section 54-2002, Idaho Code).

Even though a real estate licensee may be acting or purporting to act for a buyer or seller as a “nonagents”, that licensee is fully subject to the real estate license law and rules. Therefore, the licensee must comply with agency disclosure. This law must be logically construed to require disclosure of “nonagency” relationships as well. The Commission approved brochure must be given to all parties to the transaction and a signed receipt obtained, and the required statement in the law must be completed by the nonagent licensee in the following example. “Agency Disclosure: At the time of signing this agreement the agent working with the buyer represented **neither buyer nor seller** and the agent working with the seller represented **seller**.” In this case, the selling licensee only is the nonagent.

The Commission notes that a recent Supreme Court case in Idaho, 93.9 ISCR 476, April 1993, discusses the impact of this statement in an earnest money agreement on the actual determination of whether or not an agency relationship exists in a transaction. In this case, the plaintiff/buyer was alleging that the selling licensee acted as the agent for the buyer, despite the fact that he put “seller/seller” in the blanks on the earnest money agreement. The discussion centered on the parol (oral) evidence rule, which the court said “does not exclude evidence of the (agency) relationship between a realtor and a purchaser because an earnest money agreement refers to the realtor as the seller's agent.” The court reversed and remanded the case for further proceedings.

As this case points out, the actions and disclosures made by the licensee purporting to represent or not represent a party to a transaction are not simply solved by completing this one statement, even though it is required by law. The law is also clear that liability remains for the licensee, regardless of the legal capacity in which the licensee believes he or she is acting. In other words, just because a licensee labels himself or herself a “nonagent” or a “facilitator” does not mean there will necessarily be any reduction in civil liability, and there will be no reduction in responsibility under the license law whatsoever.

The additional problem of identity crisis exists for “facilitator”. At this time, there are no Idaho cases defining a real estate facilitator or the duties and obligations owed by a facilitator. This issue, added to the problem of imputed agency, creates a quagmire for licensees in this position.

Conclusion

Idaho Real Estate License Law and Rules does not require a licensee to form an “agency” relationship with either a buyer or seller of property in order to engage in the business of real estate.

A “nonagent” licensee can receive compensation in accordance with his or her contract rights with a buyer, seller or another licensee for work performed in the business of real estate.

Every active licensee, whether acting as an “agent” or not, must complete the agency disclosure statement in accordance with Section 54-2085, Idaho Code, and must distribute the approved blue brochure to all buyers and sellers, and obtain a signed receipt.

Each licensee, acting for another in any real estate capacity, agent or not, must be actively licensed and is fully subject to all parts of the real estate license law and rules.

In addition, licensees should be aware that civil liability will still remain for their acts. Only the

nature and extent of the liability will be affected by their agency status. Since it may be to a plaintiff's advantage to claim the existence of an agency status, licensees should also be aware that their actions during a transaction may still cause the court to conclude the existence of an agency relationship, despite what was purported on the earnest money agreement.

Because of the unsettled nature of the “nonagent” status and “facilitator” status, both from a standpoint of definition and a legal and liability standpoint, it is the recommendation of the Commission that licensees *prepare to act as agents, to assume that they may be claimed to be one by buyers or sellers and to document accordingly.*